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IN THE

Supreme Court of the United States

NO. 210

MRS. WOODROW VIRGINIA STONE, *Petitioner*

vs.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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MRS. WOODROW VIRGINIA STONE, *Petitioner*

vs.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Mrs. Woodrow Virginia Stone, respectfully prays for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, to review the judgment of the Court entered on April 13, 1948, with no opinion save the notation that the judgment

of the trial court was affirmed and the citation of two authorities, motion of petitioner for a rehearing was denied on May 12, 1948, and no opinion was rendered in connection therewith, in a case numbered and entitled on the docket of said Court as "No. 12,219, Woodrow V. Stone vs. Strickland Transportation Company, Appellee," the judgment being one simply affirming an instructed verdict entered by the trial court.

The certified transcript of the record in this case, including the proceedings in the said Circuit Court of Appeals is presented herewith in accordance with Rule 38 of this Court.

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This case involves only one question, to-wit, whether or not one Roy White was acting within the scope of his employment for the respondent, Strickland Transportation Company, in the operation of a motor vehicle for said company at the time that the Strickland Transportation Company's vehicle struck the car in which petitioner was riding, resulting in serious and permanent injuries to petitioner.

The two points involved in this appeal as set forth in the Motion For Rehearing filed before the Circuit Court are as follows:

(1) The Honorable Circuit Court of Appeals erred in holding impliedly (without a written opinion) by citing the DeFrates case that the appellee's truck driver had deviated from the scope of his employment on the occasion in question.

(2) The Honorable Circuit Court of Appeals erred in holding, and again we have to assume what was in the mind of the Court, since no written opinion was rendered and only two cases cited, but we presume that the Honorable Circuit Court intended to hold that under the Huerta case, cited in the opinion affirming the judgment, "that the appellee's truck driver, Roy White, had not resumed or returned to the zone of his employment at the time of the collision in question."

II

JURISDICTION

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Sec. 347).

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is April 13, 1948.

Petition for rehearing filed by respondents was denied May 12, 1948,

(4) It is believed that the following cases sustain the jurisdiction of this Court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. Ed. 139;

Story Parchment Co. v. Patterson Parchment Paper Co., et al, 282 U. S. 555, 75 L. Ed. 544;

Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458;

Cities Service Oil Co. v. B. P. Dunlap, et al, 308 U. S. 208, 84 L. Ed. 196;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

(5) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and said Circuit Court has decided important questions of local law in a manner in conflict with the decisions of the Texas Courts, and said Circuit Court has decided important questions of general law in a manner that is conflicting with weight of authority; and the opinion of the Circuit Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Wherefore under Rule 38 (5) (b) of the Revised Rules of the Supreme Court of the United

States, this discussion may be reviewed by this Honorable Court.

In *Galloway v. United States*, above cited, 319 U. S. 372, 87 L. Ed. 1458, this Court quotes a Writ of Certiorari in a case involving a question as to whether the evidence was sufficient to show when the plaintiff's total and permanent disability began. The majority of the Court held that the evidence was insufficient, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy dissenting.

In a very enlightening opinion, Mr. Justice Black demonstrates that *the Supreme Court should grant Writs of Certiorari in cases where the right of trial by jury has been denied, this right having been one* guaranteed under the Seventh Amendment to *the Constitution.* We cannot refrain from quoting from this most learned opinion *since it demonstrates the duty of this Honorable Court to grant this Writ of Certiorari.* In that case, Justice Black said in part as follows:

> "The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of

the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights, may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights: . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of right." So few of these cases come to this Court of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

III.

PRINCIPAL QUESTIONS INVOLVED

(a) The opinion of the Circuit Court affirming the judgment of the District Court in which an instructed verdict was granted and a jury trial was denied is clearly erroneous since the evidence in the case at bar clearly raised an issue for the jury as to whether Roy White was acting within the course of his employment for the defendant, Strickland Transportation Company.

> "The evidence in the case at bar clearly raised an issue for the jury as to whether Roy White was acting within the course of his employment for the defendant, Strickland Transportation Company, in the evidence of the said Roy White showing that he had instructions not to deliver freight unless the freight was receipted for; that at the time of the accident he was unable to deliver the freight due to the fact that there was no one at the Hill Truck Lines to receive said freight during the noon hour; that with the load of freight still upon his truck he went home for lunch and was returning to the Hill Truck Lines for the purpose of delivering the freight when the accident in question occurred; that under such circumstances, a jury issue was raised as to whether the said Roy White was acting within the scope of his employment for the defendant, Strickland Transportation Company."

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In this case, we have the additional ground that the only judicial opinion rendered was one saying that the judgment of the trial court is affirmed, citing two cases. We respectfully submit to this Honorable Court that it is not only contemplated that the petitioner was entitled to a trial by jury as to fact issues but that it was further contemplated that the Honorable Fifth Circuit owed the bar, the petitioner and petitioner's counsel the right to render an opinion stating the grounds upon which said judgment was affirmed.

We think that the opinion heretofore quoted from in the Galloway case clearly demonstrates the necessity of submitting this matter to a jury since the evidence raised a fact issue for the jury and the right for trial by jury as guaranteed by the Constitution has been denied.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of the Supreme Court of the United States directed to the United States Circuit Court of Appeals for the Fifth Circuit, demanding that Court to certify and send to this Court a full and complete transcript of the Record and of the proceedings of the said United States Circuit Court of Appeals for the

Fifth Circuit had in this cause numbered and entitled on the docket "No. 12,219, Woodrow V. Stone, Apellant, vs. Strickland Transportation Company, Appellee," that this cause may be reviewed and determined by this Court, as provided for by the Statutes of the United States and that the judgment of the said United States Circuit Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

Respectfully submitted,

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A copy of this petition for writ of certiorari and brief in support thereof has been furnished Mr. John R. Fullingim, Oliver-Eakle Building, Amarillo, Texas, attorney for Respondent.

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JOHN J. WATTS

IN THE

Supreme Court of the United States

NO. .....

MRS. WOODROW VIRGINIA STONE, *Petitioner*

VS.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

JURISDICTION

The grounds of jurisdiction stated in the petition, which is printed in this brief, will suffice and for the sake of brevity will not be here reprinted.

II.

STATEMENT OF THE CASE

The facts pertinent of the question presented are stated in the petition and in the interest of brevity are not repeated here.

III.

SPECIFICATION OF ERROR

The error which the Petitioner will urge if the writ of certiorari is issued is as follows:

The Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Western District of Texas, erred in not reversing and remanding the judgment for a new trial since the evidence raised issues of fact for the jury to determine whether Roy White, respondent's agent, was acting within the course of his employment at the time of the collision in question.

IV.

STATEMENT

The above two points will be grouped together and discussed without recopying same. The evidence involved raised the issue for the jury, or perhaps raised the proposition as a matter of law, that the said Roy White was acting within the scope of his employment at the time of the collision in question is as follows:

"Mr. Fullingim:

Q. What time did you leave Strickland Transportation Company to go to Hill Lines?

A. It was between 11:00 and 11:30. I imagine it was closer to 11:30.

Q. What time did you arrive?

A. I made Navajo before I went on to Hill & Hill.

Q. Where is Navajo?

A. It is right here on the 1100 Block.

Q. 1100 Block on Grant Street, is that correct?

A. Yes, sir.

Q. Did you unload the freight that you had for Navajo?

A. Yes, sir.

Q. When you left the Navajo, where did you go?

A. Hill & Hill.

Q. How far is it from Hill Lines—from Navajo to Hill Lines, Inc.?

A. About two blocks.

Q. What time did you say you arrived at Hill Lines?

A. A few minutes after 12:00 because the boys had took off for dinner.

Q. Then after you left—What did you do when you got to Hill Lines?

A. I got out to see if someone would check the freight to unload it but there was no one there.

Q. What did you do then?

A. Well, I left and went on out to the house.

Q. Come here on this map and follow for me from the exact time you left Hill Lines until you arrived.

A. I backed out here on 13th and Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. North from Buchanan.

Q. To Buchanan?

A. East to Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. I believe it was west.

Q How many Blocks?

A. Four Blocks.

Q. Then which direction did you go?

A. North.

Q. On what street?

A. Buchanan.

Q. How far north did you go?

A. I picked up my sister up on 7th and Buchanan.

Q. You went what direction on Buchanan now?

A. I was gong north.

Q. Where did you see your sister?

A. On 7th and Buchanan.

Q. Where had you started?

A. I had started out to the house to eat.

Q. What house?

A. My sister's.

Q. Where does your mother live?

A. North Grant.

Q. Did you go to your mother's?

A. No, sir.

Q. Why?

A. My sister said no one was out there.

Q. Where did you see your sister?

A. 7th and Buchanan.

Q. Did she get in the truck with you?

A. Yes, sir.

Q. On the corner of 7th and Buchanan Street?

A. Yes, sir.

Q. Then which way?

A. I went north to Third and Buchanan.

Q. Proceeded on Buchanan north to Third Street? Then which way did you go after you got to Third Street?

A. East.

Q. How far on Third Street did you go East?

A. To Grand Avenue.

Q. And after you got to Grand Avenue which way did you go?

A. I went south to 6th and Grand.

Q. Then which way did you go?

A. East to Dallas.

Q. Is that where your sister lived?

A. Yes, sir.

Q. What did you do when you got there to your sister's?

A. I ate and came on to 10th Street and came on in.

Q. After you left your sister's place which way did you go?

A. South to 10th.

Q. When you got to 10th which way did you go?

A. I turned west.

Q. Where did you go then?

A. I was coming in on 10th to go to Hill & Hill Motor Freight and that is where the accident occurred.

Q. How many Blocks west is the Hill & Hill Freight Line from your sister's house?

A. 34 I believe—no, Grant takes off some. About 28 Blocks I imagine.

Q. Now after you picked your sister up on the corner of 7th and Buchanan Street and proceeded south to Third Street, you say you then turned west on Third Street and went to your sister's home?

A. I turned east.

Q. Turned east and went to your sister's home and in doing that you drove right by the Strickland Transportation place of business?

A. Yes, sir.

Q. You drove right on by. How many blocks east of the Strickland Transportation Company's place of business is it to where your sister lives?

A. About 21 or 22 blocks.

Q. And at the time you drove by the Strickland Transportation Company place of business with your sister in the car and proceeded on east, you knew you were doing it in violation of strict company rules and regulations?

A. Yes, sir.

Q. What is the regular route you would normally go from Strickland Transportation Company here to Hill Lines, Roy? Show me here on the map, will you?

A. We would come out on Third.

Q. Which way would you go on Third?

A. West.

Q. To what street?

A. Grant.

Q. Which way would you turn on Grant Street?

A. South to Navajo.

Q. Isn't it true that you were instructed, and you knew at the time you went to Hill Lines and couldn't find anyone to unload this freight, that you should

have taken the truck back to Strickland Transportation Company and left it?

A. Yes, sir.

Q. That is your instructions?

A. Yes, sir.

Q. And it was true that you had instructions that you would not unload unless someone was there to give you a receipt for it?

A. Yes, sir.

Q. But it was true that if there wasn't anyone there that you were to return the truck to the Strickland Transportation Company until such time as someone was there?

A. Yes, sir.

Q. And had you gone back to the Strickland Transportation Company from Hill Lines at the time which way would you naturally have gone back?

A. I would have gone over to the Santa Fe Lunch across the tracks.

Q. Now you are at Hill Lines and if you had gone back to leave the Strickland truck to wait for someone to come back so you could deliver the freight you would have gone—

A. Gone to Third and Grant and east to Strickland Motor Company.

Q. You speak of that sometime you went to lunch with Mr. Welsh in his car, was that just a matter of accommodation?

A. Yes, sir.

Q. He had nothing to do with company business?

A. No, sir, he would just take us up there.

Q. Was it more or less on the way which he went on to his lunch?

A. Yes, sir.

Q. Where had you started at the time this accident occurred when Mrs. Woodrow V. Stone was injured on the 4th day of June about the hour of 1:00 P. M., on State Highway 287 located in the City of Amarillo at 10th Avenue. Where had you started?

A. I started to deliver some freight.

Q. Where were you going to deliver that freight?

A. Hill & Hill Motor Freight.

Q. Who instructed you to do that?

A. Mr. Welsh.

Q. When did you generally go to lunch?

A. We usually work and some of the boys take off. It is uncertain.

Q. What would you do with the company truck when loads of freight were to be delivered during the lunch hour?

A. That was the first time I was ever called out.

Q. What did the rest of the boys do in connection with that?

A. There wasn't but three of us. They ate around there and Mr. Welsh had a car and some of the boys ate with him."

The witness, Mrs. O. W. Webb, mother of Roy White, defendant's truck driver, testified as follows:

"Q. Where do you live?

A. 707 N. Grant.

Q. You are the mother of Roy White, the driver of the truck involved in this acccident?

A. Yes, sir.

Q. Whenever your son would have lunch at your house during the time he worked for Strickland Transportation Company, how would he come home?

A. In a truck.

Q. Strickland Transportation Company truck?

A. Yes, sir.

Q. He would eat lunch—

A. (Interrupting.) Whenever he did come home for lunch he did come home in the truck.

Q. You are also the mother of Thelma Busby?

A. Yes, sir.

Q. She was out in California sometime ago, wasn't she?

A. Yes, sir.

Q. A sister of White?

A. Yes, sir.

Q. About how long was it she was living in California?

A. I cannot tell you, I do not remember, two or three years you know.

Q. She got back last March?

A. Yes, sir.

Q. Do you remember whether your son ate lunch with you the day this accident occurred or not?

A. I don't know.

Q. You do not remember?

A. I do not remember.

Q. Did you and Thelma ever ride in the company truck?

A. No, sir."

Mr. J. T. Welsh testified as follows:

"Q. You carried him quite often to lunch?

A. I would two or three times a week.

Q. You carried him so as to make it easier for him to get back to work sooner, is that right?

A. Yes.

Q. 10th Street, that is a paved Street?

A. Yes.

Q. And that Street, of course Mr. White would deliver freight all over town, wouldn't he?

A. He did in the course of his job, yes." (R. Pg. 18).

Q. Did you ever give any instructions except the instructions that they were not to use the truck except on company business, that is the only instructions that were ever given?

A. What do you mean?

Q. I say the only instructions that you ever gave were those you have just testified about, that is, that company trucks were not to be used except on company business on these placards?

A. Yes, and also they could not drive the trucks home and could not take them home at night. (R. Pg. 20).

Q. You did not undertake to tell him how to go to the Hill Lines on this particular morning?

A. Not this particular morning.

Q. You knew at the time this accident happened he was on his way to deliver freight to Hill?

A. He was coming back from where he had left.

Q. Going to Hill, was his freight still on the truck that he started out to deliver to Hill at the time the accident occurred?

A. Yes. (R. Pgs. 21 and 22).

Q. State whether or not at the time you employed Mr. White you gave him any instructions with reference to whether or not he could or could not use those company trucks down there for any type and mode of transportation other than on company business.

A. They were emphatically given instructions that they were not to use them for any personal use, for business only for the company." (R. Pg. 9)

The deposition of the witness truck driver, Roy White, first read as follows:

"Q. In fact, they had placards on the door and around the place of business to the effect that no one was to use company property except on company business. Is that true?

A. I believe that is sc.

Q. Mr. Welsh told you that on no occasion were you to drive a company truck to lunch other than on company business.

A. That is right." (R. Pg. 26) After the deposition had been prepared, the word "or" was inserted in the deposition.

At the conclusion of the Witness, Welsh's, testimony, the following question and answer was given which shows conclusively that White was never directly instructed not to take the company truck home for lunch:

"Q. You have been on the stand about thirty minutes?

A. I don't know.

Q. And you have testified as to all instructions that were given them and you never mentioned that particular instruction except on this last statement when he asked you if they made that direct instruc-

tion, isn't that right; in other words you have constantly stated in the presence of the jury when you were asked what instructions were given, that the only instructions were not to use the truck except on company business.

A. Not to take it home for lunch, that would be off of company business." (R. Pg. 23)

AUTHORITIES

Chisos Mining Company v. Huerta, et al., (Sup Cit.), 171 S. W. (2d) 867;

Collin County Motor Co. v. Howard, 121 S. W. (2d) 460;

Gulf Refining Co. v. Texarkana & Ft. S. Ry. Co., 261 S. W. 169;

Maryland Casualty Company v. Levine, 67 Fed. (2d) 816;

Pierce-Fordice Oil Ass'n. v. Brading, 212 S. W. 707;

Wilhoit et al. v. Iverson Tool Co., 119 S. W. (2d) 709;

Broaddus v. Long, 138 S. W. (2d) 1057;

Orris v. Tolerton v. Warfield Co., 207 N. W. 365;

Southern Bell Telephone & Telegraph Co. v. Quick, 149 So. Rep. 108;

Gammill v. Mullins, 188 S. W. (2d) 986;

Central Truckaway System, Inc. v. Moore, 201 S. W. (2d) 725;

Loper v. Morrison, 145 P. (2d) 1.

ARGUMENT

The evidence briefly summarized simply shows that the defendant's truck driver, Roy White, was instructed to deliver freight to Hill & Hill Motor Lines; that upon arriving at Hill & Hill Motor Lines, it was during the noon hour and there was no one there to deliver the freight to and White had orders from his employer not to deliver freight without someone being there to sign a receipt for same. This was the first time that White had ever been called out with freight during the noon hour.

The evidence is conflicting as to whether it was customary for him to take the company truck home to lunch, the evidence of the company's witnesses showing that it was a violation of orders and the evidence of his mother showing that he quite often and customarily brought the truck home. We feel that the DeFrates case, 125 S.W (2d) 282, relied upon by the Court and the Appellee, is easily distinguishable, Judge Hickman recognizing the distinction between the DeFrates case and the case at bar in the following language:

> "Many of the cases which are relied upon as departures from, or exceptions to the above rule may

be grouped into two classes, first, those in which the departure was not wholly disconnected from the employment, but in which there was a mingling of the personal purpose of the servant with the doing of the master's work, and, second, those in which the departure was but a deviation and not a complete turning aside. This case does not fall within either of these two classes, but is one of a complete departure for a purpose not connected with the employer's business and not with the employer's consent."

We think it quite obvious that the departure here involved, to-wit: going to said lunch while waiting for the employees of Hill & Hill to return so that he could deliver freight as instructed by his employer, could not, for any purpose, be considered a complete departure wholly disconnected with his employment but at the most, there was a mingling of the personal purpose of the servant with the doing of the master's work, and, second, the departure was but a deviation and not a complete turning and the employee was on his way to deliver the freight and had returned back to the zone of his employment at the time of the accident. Our two points are well supported by the following authorities: The cases speak for themselves so as to sustain our points:

In the leading Texas case of *Gulf Refining Company v. Texarkana & Ft. S. Ry. Co.*, Supra, the court said:

"While it is true, as is urged by appellant, that the testimony of the driver of the truck that he had

traveled two blocks away from appellant's warehouse *and was on his way to lunch at his mother's home* at the time the accident happened was not contradicted by any other testimony, *it is also true that the further testimony of said driver that he had an empty barrel and cans in the truck which it was his duty to return to appellant's warehouse, and that he went from the scene of the accident to said warehouse instead of to* his mother's home, was not in any way contradicted. It seems, therefore, that however far the driver may have intended to deviate from a direct route to the warehouse he in fact deviated only two blocks therefrom.

"By the rule applicable, 'where (quoting from Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29 27 L. R. A. 161, 38 Am. St. Rep. 361), the deviation is slight and not unusual, the court may, * * * as matter of law, determine that the servant was still executing his master's business.'

"Considering the matter from the standpoint of what the driver did, instead of from that of what he said he intended to do, we think the trial court had a right to conclude that the deviation was 'slight' within the meaning of the rule, and therefore that it appeared as a matter of law that the driver was still executing appellant's business at the time of the accident. Long v. Nute, 123 Mo. App. 204, 100 S. W. 511; Fidelity & Casualty Co. v. Ry. Co., 207 Mo. App. 137, 231 S. W. 277; Mathewson v. Edison Co., 232 Mass. 576, 122 N. E. 743; Schrayer v. Bishop, 92 Conn. 677, 104 Atl. 349; Fisick v. Lorber, 95 Misc. Rep. 574, 159, N. Y. Supp. 722; Duffy v. Hickey, 151 La. 274, 91 South 733; Thomas v. Lockwood Oil Co., 174 Wis. 486, 182 N. W. 841.

If, however, we thought the character of the deviation should be viewed from the standpoint of what the driver of the truck said he intended to do, *we still would be of the opinion it appeared as a matter of law that the driver had not abandoned the performance of duty he owed appellant, and that his deviating from a direct route back to the warehouse with the intent to go to his mother's for lunch was a mere incident of service he was then performing for appellant, to-wit, returning the empty barrel and cans referred to to appellant's warehouse.* Schrayer v. Bishop, supra.

(3) And, if we thought the action of the trial court was not supportable on either of the views stated, *there is still another view which we think he had a right to take of the case as made by the testimony, and that is that the driver in using the truck* (loaded as it was with articles it was his duty to carry to appellant's warehouse) *for the purpose of going to his mother's to lunch, combined his own and appellant's business. If the* driver did that, appellant was liable as determined by the judgment. 18 R. L. L. 797; Barmore v. Railway Co., 85 Miss. 426, 38 South. 210, 70 L. R. A. 627; 3 Ann. Cas. 594, and note, page 607; Tuttle v. Dodge, (N. H.) 116 Atl. 627; Jones v. Lozier, 196 Iowa 365, 191 N. W. 103; Whimster v. Holmes, 177 Mo. App. 130, 164 S. W. 236."

The Huerta case, supra, by the Supreme Court of Texas, peculiarly supports our proposition as follows:

"We believe that that the rule appropriate to the peculiar facts of this case is that the relation of

master and servant, temporarily suspended by the servant's departure from his work to accomplish a purpose of his own not connected with his employment, *is re-established when he has returned to the place where the deviation occurred, or to a place where in the performance of the duties he is required to be.* This is the substance of the rule as stated in Corpus Juris, Vol. 42, pp. 1112, 1113, Sec. 871, and in Blashfield's Cyclopedia of Automobile Law and practice, Permanent Edition, Vol. 5, p. 212, 3051, which are cited in the opinion of the Court of Civil Appeals. The opinion is Southwest Dairy Products Co. v. DeFrates, 132 Tex. 556, 560, 125 S. W. 2d 282, 284, 122 A. L. R. 854, by the use of the phrase, 'returning to the zone of his employment', indicates recognition of the foregoing principle.

The texts of Corpus Juris and Blashfield's Cyclopedia, above cited, are well supported by authorities from other states. In one of the cases cited, the opinion was expressed that when the servant returned *'to a point that might be said to be within the zone of his employment', the master's liability for his acts afterward occurring in the conduct of the business was re-established.* Orris v. Tolerton & Warfield Co., 201 Iowa 1344, 207 N. W. 365, 368.

In another case, it was held that if the accident occurred when the employee was 'at a place where he might properly be,' were he confining his conduct strictly to the business of the employer, and if his movements at the place were impelled by a purpose to accomplish the employer's business, the jury was authorized to find that he was within the scope of his employment, although he had thereto-

fore deviated on an errand for a third person. Dale v. Armstrong, 107 Kan. 101, 190 P. 598.

The residence to which Andreau had gone to listen to the radio, although on the company's property, was somewhat removed from the buildings of the plant. When the boy was struck, Andreau had traveled a little more than 700 feet from the residence and had reached an open area surrounded by the buildings of the plant. He was on the company's road running east and west and between its office building and one of the machine shops to which he was going and where had work to do. The machine shop was 150 to 200 feet west of the point where the accident occurred and the office building was a shorter distance to the east. There were two other machine shops nearby, to the southwest and about 60 to 100 feet distanct. *Andreau was then within an area and at a place where the performance of his duties constantly took him. He had no particular place to work, his duties being to supervise other mechanics and to see that* the company's machinery was kept in good condition, and in the performance of those duties he went from place to place and from building to building as his own judgment directed. *He was, at the particular time, 'within the zone of his employment'* and about his master's business.

"The facts in Missouri, K. & T. R. Co. v. Edwards, Tex. Civ. App., 67 S. W. 891, in which writ of error was refused, are very similar to those in this case. While the plaintiff was standing near one of the defendant's passenger trains at a depot, where he had gone to meet some friends, defendant's brakeman, in the effort to board the outgoing train, care-

lessly ran into him and knocked him under the moving train. The defense was that the railway company was not liable because the brakeman was not then in the discharge of his duties. The brakeman's place of duty was on the opposite side of the train, but he had come to a saloon or restaurant on the side of the train where the accident occurred, and was hurriedly returning to board the train, then just moving away, when he ran against the plaintiff. The court held as a matter of law that, while the brakeman 'may not have been on his master's business in stepping aside to the saloon or restaurant, * * * he was when he ran over appellee in the effort to resume his accustomed place of service'."

In the Texas case of *Collin County Motor Company v. Howard*, supra, the court said:

"We believe that, under the facts of this case, Franklin, at the time of the collision, had resumed his employment, which had been effectually interrupted by his stepping aside on missions purely his own, and was then engaged in the performance of duty or work for his master in his sojourn home with his master's automobile. Franklin's employment as salesman for the Collin County Motor Company was unlimited as to the time he was allowed to work, that he was expressly authorized to retain possession of his employer's automobile and became responsible for its safekeeping and return. Franklin's duty on the day in question was to go to Dallas, *and it was equally his duty to return to McKinney.* His employment was not so restricted as to require him to return immediately, or at any specified time, on ces-

sation of his employer's errands; nor, did it prevent him from interrupting his employer's business for the time and performing missions of his own * * * he had taken up his master's duties—*gotten back on the highway to McKinney, over which he was expected to return*, and was driving home with his master's automobile when the collision occurred."

The Honorable Fifth Circuit in the Levine case, supra, in an opinion by Judge Hutcheson, recognized the rule announced in the following cases:

"* * * it is with equal universality held that, the deviation over, all injuries thereafter received are compensable. State Compensation Ins. Fund v. Industrial Comm., 80 Colo. 130, 249 P. 653; Railway Express Agency v. Lewis, 156 Va. 800, 159 S. E. 188, 76 A. L. R. 350; Stratton v. Interstate Fruit Co., 47 S. D. 452, 199 N. W. 117; Webb v. North Side Amusement Co., 298 Pa. 58, 147 A. 846; Self v Shirkie Coal Co., 89 Ind. App. 673, 166 N. E. 613; Federal Mutual Liability Ins. Co. v. Industrial Accident Comm. 94 Cal. App. 251, 270 P. 992; Southern Casualty Co. v. Ehlers, (Tex. Civ. App.) 14 S. W. (2d) 111."

In the Levine case, the court further stated as follows:

"It is argued, however, that because he deviated by continuing west after he reached Main Street, along which his proper course lay, in order to go into the San Felipe district on private business of his own, he broke the continuity of his employment, and, going beyond its scope, abandoned the protection

of the compensatory coverage; that, having abandoned, it he did not return to its protection until he reached the place where he was to resume work; that on the way there he was merely one of the general public outside of his employment and the protection of its coverage.

"This will not do. The jury found, upon ample supporting evidence, that Levine was, when killed, on the direct route to the place to which he had been sent on company business. *Thus it stands established that, the only deviation at an end, he had resumed his route and duty,* and that the only reason for his being where he was when he was killed was the business of the company which, under direct injunctions from his employer, he was on his way to perform."

The Texas case of *Pierce-Fordice Oil Ass'n. v. Brading,* supra, is clearly in point. In that case the court said:

"If the deviation from such instructions amounts to an entire abandonment of the master's service, then the master is not liable; but if such deviation *is a mere incident to the discharge of a duty which the servant is performing at the time such departure occurs, and after the termination of which authorized service is resumed, then the master is liable.* * * * in the present suit, the trip of Ward to the post office in the automoblie to mail the report to his superior officers in Ft. Worth was one of the duties of his employment, *and he was resuming that journey after the temporary stop at the railway station when he ran the machine over the plaintiff.* Hence it cannot be said that the operation of the machine at the time

of the injury was a departure from and an abandonment of the master's service. * * * We conclude, further, that Ward's intention to continue his journey to his home in the automobile after mailing the papers at the post office did not fix and determine the legal character of his entire trip after leaving the warehouse as a trip exclusively for his own convenience, and not in the interest of the company. * * * If it was Ward's duty to assist in the preparation and mailing of the invoice during the night of the accident, which appellant does not deny, then we perceive no room for reasonable doubt that the trip was made within business hours, especially in the absence of any proof that the performance of such services at that hour of the night was forbidden by the defendant."

"In the case of Broaddus v. Long, by the Supreme Court of Texas, 138 S. W. (2) 1057, the undisputed evidence showed that the taxi driver was driving a cab as an accommodation for another taxi driver's benefit after he had checked in the cab he was supposed to drive without the knowledge and consent of his employer. The Supreme Court said on page 1059 of the opinion: 'We have carefully examined this record in regard to the testimony therein contained and in our opinion even to admit that such evidence, if believed by the jury, would constitute a complete defense for Broaddus in this action * * * STILL WE DO NOT THINK THAT SUCH EVIDENCE COMES FROM WITNESSES WHO UNDER THE CIRCUMSTANCES IN THIS RECORD, THE JURY WAS BOUND TO BELIEVE.'

"The case of Orris v. Tolerton v. Warfield Co., 207 N. W. 365, is a case recognized as authority then controlling by the Supreme Court of Texas in Chisos Mining Co. v. Huerta, which we have quoted to the Court. In that case the Court said:

" 'The undisputed facts that the truck belonged to defendant, that Taylor was employed by defendant to operate it, *and with it to deliver merchandise over the city, together with the fact that the accident occurred within the territory in which he was employed, and during hours within which deliveries were or might be made,* would justify the jury in inferring that Taylor, at the time of the accident, was in the line of his employment. Landy v. Oversen, 174 N. W. 255, 187 Iowa 285; Baldwin v. Parsons, 186 N. W. 665, 193 Iowa 75; Curry v. Bickley, 195 N. W. 617, 196 Iowa 827; Mooney v. Canier, 197 N. W. 625, 198 Iowa 251; Napier v. Patterson, 196 N. W. 73, 198 Iowa 257. See further Stumpf v. Montgomery, 226 P. 65, 101 Okl. 257, 32 A. L. R. 1490; Lee v. Pierce, 239 P. 989, 112 Okl. 212.'

"Disregard of instruction, or mere deviation by Taylor from his tract line of duty, though for purposes of his own, would not of itself relieve defendant from responsibility. *The departure must have been so substantial as to amount for the time being to an abandonment of the business of the defendant and to the serving of some purpose wholly independent of it.* Jones v. Lozier, 191 N. W. 103, 195 Iowa 365; Curry v. Bickley, 195 N. W. 617, 196 Iowa 827; Rowland v. Spalti 194 N. W. 90, 196 Iowa 208; Traynor v. Keefe Construction Co., 202 N. W. 218, 199 Iowa 575; Baker v. Allen, 131 N. E. 551, 231

161, 28 Am. St. Rep. 361, 27 L. R. A. 161; Loomis v. Hollister, 55 A. 561, 75 Conn. 718; Thomas v. Lockwood Oil Co., 182 N. W. 841, 174 Wis. 486; McKeage v. Morris (Tex. Civ. App.) 265 S. W. 1059; Gulf Refining Co., v. Texarkana, etc. Co. (Tex. Civ. App.) 261 S. W. 169.

"Whether the servant at a given time is acting within the scope of his employment must usually be decided, not only from the established facts, but from presumptions and inferences raised by them. The question is usually one of fact for the jury, and rarely one which may be disposed of by the Court as a matter of law. Seybold v. Eisle, 134 N. W. 578, 154 Iowa 128, 135 Ann. Cas. 1914-a, 1097; Gulf Refining Co. v. Texarkana, etc. Co., (Tex. Civ. App.) 261 S. W. 169; Michel v. Southern Lumber Co., (N. Y. Sup.) 127 A. 580; Venghis v. Nathanson (N. J. Err. & App.) 127 A. 175; Ritchie v. Waller, 28 A. 29, 63 Conn. 155, 27 L. R. A. 161, 38 Am. St. Rep. 361; Loomis v. Hollister, 55 A. 561, 75 Conn. 718; McKeage v. Morris, (Tex. Civ. App.) 265 S. W. 1059; 13 C. J. 1361, 1362. If Taylor at the time of the accident was acting in the course of and within the scope of his employment defendant would be liable for his negligence, notwithstanding the fact that he might at the same time have been serving some purpose of his own. Jones v. Lozier, 191 N. W. 103, 195 Iowa 365; McKeage v. Morris, (Tex. Civ. App.) 265 S. W. 1059; Thomas v. Lockwood Oil Co., 182 N. W. 841, 174 Wis. 486; Gulf Refining Co. v. Texarkana etc. Co. (Tex. Civ. App.) 261 S. W. 169.

"The deviation claimed was at most a suspension or temporary abandonment by Taylor of the defend-

ant's service. If Taylor in going to his mother's house for the bed spring did totally depart from defendant's business of his own exclusive purpose, the relationship of master and servant was restored when he returned to the point of departure *or the zone of service as it was when he left it, for it remained his duty to take the truck thence to his home.* When he returned to that point or *to a point that might be said to be within the zone of his employment on that occasion* and was engaged in taking the truck to his home, the defendant's liability for his acts afterward occurring in the conduct of the business was re-established. Curry v. Bickley, 195 N. W. 617, 196 Iowa 827; Riley v. Standard Oil Co., 132 N. E. 97, 231 N. Y. 301, 22 A. L. R. 1382; Bormore v. Bicksbury, etc. Co., 38 So. 210, 85 Miss. 426, 70 L. R. A. 627, 3 Ann. Cas. 594; Thomas v. Lockwood Oil Co., 182 N. W. 841, 174 Wis. 846; Cummings v. Republic Truck Co., 135 N. E. 134, 241 Mass. 292."

"We do not think the Court was warranted on this record in ruling as a matter of law *either that Taylor in going to his mother's house did depart from the line of his employment to such an extent as to relieve the defendant from responsibility for his conduct on his way back to his own home with the truck,* or that he had not at the time of the accident resumed performance of the duties of his employment."

In *Southern Bell Telephone & Telegraph Co. v. Quick,* 149 So. 109, the Court held:

"But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent

of deviation by the servant from the strict course of his employment or duty, it has been generally held to one of fact and not of law. In such it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not usual, the court may and often will, as a matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."

"In the recent case of Loper v. Yazoo & M V. R. Co., (Miss.) 145 So. 743, in discussing the meaning of the phrase 'Scope of employment,' the Court held that this phrase 'adopted by the courts for the purpose of determining a master's liability for the acts of his servants, had 'no fixed legal or technical meanings,' 399 C. J. 1282; and '*the ultimate question is whether it is just that the loss resulting from the servant's acts should be considered one of the normal risks of the business in which the servant is employed which that business should bear.*' A. L. I. Rest. Agency, Tent. Draft No. 5, p. 53. The matters of fact usually taken into consideration in answering this question are set forth in Sec. 454, A. L. I. Rest., supra, one of which is 'whether the master had reason to expect that such will be done.' Little, if any difficulty arises therein except in cases, as here, wherein the servant's conduct was in excess of that authorized. The concensus of authority, and the rule of this

court, is the fact that a servant's conduct was unauthorized does not bring it without the scope of his employment, *provided it is 'of the same general nature as that authorized, or incidental to the conduct authorized.'* (Citing authorities)

"The difficulty of applying the legal rules to the ever varying facts and circumstances which present themselves is well illustrated by the fact that in the very able and exhaustive briefs of counsel in this case, in many instances, cases are cited from the same jurisdictions as tending to support the contention of the respective parties, the decision in each case being shaded and controlled by the particular facts presented, and for that reason it will be impossible within the compass of an opinion of reasonable length to undertake to set forth the facts and to distinguish this long list of cases from state and federal jurisdiction.

"In the case at bar, facts were established from which the prima facie presumption arose, that, at the time of the accident, the servant was acting within the scope of his employment and was engaged about his appointed duties. To meet the burden thus cast upon it to show that its servant was not about his master's business, *the appellant Co. relied solely upon the testimony of the servant. This servant, also a defendant, was hostile to the appellee, and his testimony was full of contradictions, and he was so thoroughly contradicted by other witnesses in material respects that the jury might well have been warranted in rejecting his testimony as to his mission, the instruction given him by the master, and the customary use of the automobile by him and the knowledge of the master of that fact.*

"The fact is that Johnson, the telephone company's manager of the Meridian plant and territory, who was said to have given Stewart orders on the occasion in question, and who was in the best position of any one to know of the facts with reference to these matters, was in the courtroom during the trial, but was not offered as a witness; and the failure of the defendant company to present this witness who was present and who was friendly to it, and who knew exculpatory facts, if any one did, raised a strong presumption that such facts do not exist. Anderson v. Tele. & Telegraph Co., 86 Miss. 341, 38 So. 786. To like effect see also Hicks v. Nassau Elec. Ry. Co., 47 App. Div. 479, 62 N. Y. S. 597; Northern Pac. Ry Co. v. Craft, (C. C. A.) 69 F. 124; Grainesville, etc. Rr. Co. v. Wall, 75 Ga. 282.

"The proof shows that the master furnished the servant an automobile for use in the discharge of his appointed duties; that for a long period of time he had been permitted and expected to use and drive this automobile over the streets of the city of Meridian without any directions as to the route he should travel; that his superior knew where he resided, and that he customarily went to his residence for his meals. On the occasion in queston, the regular lunch hour of both Stewart and his superior, Johnson, had passed, and Johnson could not be relieved at the power board until the servant Stewart, reported at the plant for that purpose. At the time the supposed order was given, Johnson knew that Stewart had the automobile and was at a point nearly midway between the warehouse and his residence, where he would get his lunch. He knew that,

in order for Stewart to store the automobile in the wareroom and then go to his residence for lunch, it would be necessary for him to drive six or seven blocks west and then, unless some uncertain means of transportation could be secured, return on foot over the same route to the point where he had been working and ten city blocks beyond, requiring him to walk more than thirty-two city blocks on this June day before he could report to the plant and relieve his superior who was working overtime and long past his usual lunch hour. At the time of the accident, there was in the automobile which the servant was driving, tools, wires and equipment belonging to the master, which it was his duty to care for and deliver, along with the automobile to the warehouse; and, it does not appear that the servant had abandoned his duty and ultimate purpose.

"The collision occurred within ten minutes after Stewart received the order to get his lunch and report to the plant, *and within six city blocks of the place from which he started to his residence, and, under the circumstances herein set forth, we think the master should reasonably have expected that the servant would use the automobile for the purpose indicated. Any other course of action on the part of the servant would have been the unexpected, and, in fact, the improbable, and we are of the opinion that it was proper to submit to the jury the question of whether or not, under all the facts and circumstances, the act* of the servant in using the automobile was an act which the master had reason to expect would be done, and was so closely connected with and incidental to the discharge of the servants' appointed duty as to con-

stitute a mere deviation from the scope of his employment, and not a total departure therefrom.

"Many cases from other jurisdictions, wherein the facts are somewhat analogous, support the view above stated. In the case of Bryan v. Bunis, 208 App. Div. 389, 203 N. Y. S. 634, one of the defendants, about the noon hour, directed his employee to take him from the shop to his home in an automobile truck owned by the defendant, and when this had been done, he instructed the employee to take the truck back to the shop. But, instead of returning directly, the employee started to his home for dinner, which was a deviation of about a half mile. While making the journey to the employers' home, the truck struck and injured the plaintiff, and, in passing on the questions presented on appeal from a judgment in favor of the plaintiff, the court said:

" 'In determining whether or not liability exists under given circumstances, no hard and fast rule on the subject, either of time or space, can be applied. *The choice of a different way back does not, as a matter of law, constitute an abandonment of the master's work.* Riley v. Standard Oil Co., 231 N. Y. 301, 132 N. E. 97, A. L. R. 1382. Courts will not be limited by tests that are merely mechanical or formal; and its judgment, though it may be guided by location in time and space, will not be controlled by such circumstances, if there are others that characterize the intent of the transaction. Fiocco v. Carver, supra, at pg. 223 (of 234 N. Y.) 137 N. E. 310.'

" ' *In this case the defendant, directing the servant's movements, knew that the usual hour of meal time was at hand. He knew where the chauffeur lived.*

*Certain employees are by law given a fixed period for the noon day meal. * * * Custom has decreed a similar period for others. This defendant knew that Evans was allowed the time from 12:00 to 1:00 for such purpose. The comparatively slight deviation by Evans of a half mile from the direct route back to the shop, in order that he might obtain his usual noonday meal, was not an engagement in a new independent enterprise, or an abandonment of his master's work.* It was a part of his daily duty, and when his employer took him from the shop at the noon hour, and, after his immediate errand was performed, directed him to return, *it was within his contemplation that the ambit of the chauffeur's duty would not require him to be back at the shop until 1:00 o'clock, and that in the meantime, at some place presumptively his home, he would obtain his midday meal.* His employment was not changed at least as a matter of law, by going to his home on this errand. Pallocco v. Lehigh Valley R. R. Co., 236 N. Y. 110, 140 N. E. 212. To go at the usual time for a meal (Sundine's case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916a 318) and to his home after the day's work is done (Erie R. Co. v. Winfield, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, (Ann. Cas. 1918b 662)) are incident of employment.'

" 'We have recently held that a slight deviation, even for the servant's own benefit, from the course of work required by the master, will not necessarily relieve the master from the liability for an accident occurring during such deviation. Bush v. Sinclair Rooney & Co., 207 App. Div. 699, 201 N. Y. S. 804. The jury found here, under proper instructions, that Evans had not abandoned the employment of the de-

fendants when the accident occurred. *The deviation, therefore, was but temporary, and the objective of Evans was the shop to which his duty and his master's direction called him at 1:00 o'clock.*' In Baum v. Schweitzer, 124 Misc. 516, 208 N. Y. S. 549, the court said: 'In the present case the defendant's business was the selling of game and similar provision to hotels and other consumers. The chauffeur was called upon to begin work very early in the day, and the hours of the actual deliveries to be made by him consumed the entire day. That he went to lunch at a somewhat unusual hour does not, under these conditions, indicate that as a matter of law his stopping for lunch was not within the contemplation of the employment. To go 17 blocks in an automobile in the city of New York is a detour requiring not over 10 or 15 minutes of time. * * *

" '*There are some aspects of the testimony which throw doubt upon the correctness of the defendant's version of the facts which has been assumed herein. It was for the jury to pass both upon the correctness of this version and upon the further question whether the deviation, if it occurred, was so material as to constitute a frolic rather than a detour.*'

"In the case of Butler v. Hyperion Theatre Co., 100 Conn. 511, 124 A. 220, it was held that the question of whether or not the conduct of the servant was in the execution of the master's business within the scope of his employment was properly submitted to the jury; and the facts upon which this holding was based sufficiently appear from the following quotation from the opinions:

" 'The defendant claims that the evidence shows that Garrison (his employee) had specific directions to bring the car to the front of the Hyperion Theatre on Chapel St. at noon of each day and leave it there during the luncheon hour, and then go and get his lunch and return for the car and new instructions; that on this day he did not bring the car and leave it in front of the theatre at noon, but used the car at that time and started to go to his home in it for lunch, contrary to his unmodified instructions. The defendant claims that these facts show that at the time of the collision he was not using the car in the execution of the defendant's business, and therefore, the defendant was not liable for his negligence. * * * *Under the evidence in this case the jury could reasonably have found that Garrison, the servant, was delayed in his work on the forenoon of the day in question, and was late, and that he reasonably believed he could perform the essentials of his employment in billposting with greater advantage to his master if instead of driving late to the theatre at lunch time, he drove first to his home and lunched and then drove to the theatre for instructions for his afternoon work, and that solely with the intent to further and aid in the performance of his master's business, he adopted that course of conduct.* It is apparent, therefore, that the jury could reasonably have found that at the time of the collision Garrison was engaged in the execution of the master's business within the scope of his employment, and it could not be questioned that with such a finding a veridct for the plaintiff could reasonably have been found.'

"Many other cases might be cited holding that the question of whether or not the servant was in the

execution of his master's business within the scope of his employment, was one of fact to be determined by the jury, among them being the following: Wagnitz v. Scharetg, 89 Cal. App. 511, 265 P. 318; Begrens v. Hawkeye Oil Co., 151 Minn. 378; 187 N. W. 605; Boehmer v. Short, 184 Ark. 672, 43 S. W. (2d) 541; Kavale v. Morton Salt Co., 329 Ill. 455, 160 N. E. 752; Crowell v. Duncan, 145 Va. 489; 134 S. E. 576; 50 A. L. R. 1425; Dockweiler v. American Piano Co., 94 Misc. 712, 160 N. Y. S. 270; Perry v. Haritos, 100 Conn. 476, 124 A. 44; Barney v. Magenis, 241 Mass. 268, 135 N. E. 142; Dennis v. Miller Automobile Co., 73 Cal App. 293, 238 P. 739; Kruse v. White Bros., 81 Cal. App. 253 P. 178; Edwards v. Earnest, 208 Ala. 539, 94 So. 598; Barz v. Fleischmann Yeast Co., 308 Mo. 288, 271 S. W. 361; Peterson v. R. Co., 265 Mo. 462, 178 S. W. 182; Drake v. Norfolk Steam Laundry Corp., 135 Va. 354, 116 S. E. 668; Loomis v. Hollister, 75 Conn. 718, 56 A. 561; Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N.S.) 382, 19 Ann. Cas. 1227; Nord v. West Mich. Flooring Co., 238 Mich. 669, 214 N. W. 236; Jordan Stabler Co. v. Tankersly, 146 Md. 454, 126 A. 65; *Gulf Refining Co. v. Texarkana & Ft. S. Ry. Co., (Tex. Civ. App.) 261 S. W. 169;* Fleischmann Co. v. Howe, 213 Ky. 110, 280, 496, Blaker v. Philadelphis Elec. Co., 60 Pa Supere. Ct. 56."

The Honorable Circuit Court of Appeals for the Fifth Circuit, in the case of *Standard Coffee Co. v. Trippet*, 108 F. (2d) 161, a case in which Justice Hutcheson and Justice Holmes participated in the decision, held:

> "The jury had the right and may have discredited his testimony as being inherently improbable. The rebutting testimony was not so clear, positive, and unequivocal as to warrant, as a matter of law, the overturning of the presumption arising from the ownership and operation of the automobile. Under all the facts and circumstances of this case, we think it clear that the issues raised were properly submitted to the jury."

This case finds full support in a case by the Supreme Court of Texas decided since the decision in the DeFrates case and the decision being by Justice Critz and the case being that of *Broaddus v. Long*, 138 S. W. (2d) 1057, in which Judge Critz held in substance:

> "In a case where the defendant offered evidence to overturn the presumption involved and to show that the taxicab driver was wholly on a mission of his own, that the jury did not have to believe the evidence which came from the witnesses who attempted to rebut the presumption and that hence, the case was for the jury."

Of course, the rule is well established in Texas, according to 5 Tex. Jur., Pg. 778, that:

> "If, within the course of his employment, an employee is permitted to use his employer's vehicle to facilitate the performane of necessary errands of his own, he does not, while on this errand, cease to be an employee but is still an employee and the legal principle of respondeat superior applies."

This has been held to be true where the driver would take the company car home for lunch. The Texas case of *Davis v. Jeffords-Schoenmann Produce & Brokerage Co*, 261 S. W. 401, is cited in which the Court said:

> "The particular use he was making of the car at the time of the accident, going to his lunch in it, was not only one he was expected by them to make of it, but they had turned it over to him during the noon hour for that purpose, and he was to so go to his lunch in that neighborhood, when he made or was out on a delivery for them, whenever the noon hour struck. He could not therefore be said to have been on an errand exclusively his own, but at least was so mingling his master's business with his own incidental interest in going for lunch in a conveyance they had furnished him for the convenience of both in that respect as that, for the brief time involved, the relation of master and servant was not broken or terminated."

We have proof in this case which would justify the inference which is required, that is, the one most favorable to the plaintiff that White, who lived with his mother, would always come home in a truck belonging to the Strickland Transportation Company. (R. Pg. 34) In addition to that, White also testified that this was the first time that he had ever been called out at 12:00 and didn't know what he should do with the truck under such circumstances. The interest of the Strickland Transportation Company in wanting the men to get back from their

lunch in a hurry is shown by the testimony of J. T. Welsh heretofore set out in the Statement. At the conclusion of the witness, Welsh's testimony, the following question and answer was given which shows conclusively that White was never directly instructed not to take the company truck home for lunch:

"Q. You have been on the stand about thirty minutes?

A. I don't know.

Q. And you have testified as to all instructions that were given them and you never mentioned that particular instruction except on this last statement when he asked you if they made that direct instruction, isn't that right; in other words, you have constantly stated in the presence of the jury when you were asked what instructions were given, that the only instructions were not to use the truck except on company business.

A. Not to take it home for lunch, that would be off of company business." (R. Pg. 23)

The above testimony is not clear, positive and unequivocal that White had been instructed not to take the car home for lunch hence, this matter was for the jury.

This is particularly true under the Texas decisions, for instance, in the recent case of *Gammill v. Mullins*, 188 S. W. (2d) 986, the court citing a great number of Texas cases, said:

> "While the jury has no right arbitrarily to disregard the positive testimony of unimpeached and uncontradicted witnesses, the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury . . . . Stated in another form, the rule, uncontradicted, uncorroborated testimony of a party to a suit will not authorize or support instructed verdict for him."

We feel, however, that if the court holds that we are in error in the above proposition, that the Supreme Court of Texas, in a far more recent case than the DeFrates case, to-wit: the case of *Chisos Mining Company v. Huerta*, 171 S. W. (2d) 867, has conclusively ruled when the law in that case is applied to the facts here that White had returned to the zone of his employment. This language from the Huerta opinion, coming from the Supreme Court settles this matter as follows:

> "In another case, it was held that if the accident occurred when the employee was at a place where he might properly be, were he confining his conduct strictly to the business of the employer and if his movements at that place were impelled by a purpose to accomplish the employer's business, the jury was authorized to find that he was within the scope of his employment although he had theretofore deviated on an errand for a third person."

The above evidence heretofore set out shows that White had reached the place where he might properly be, were

he confining his conduct strictly to the business of his employer. They further show that his movements at that place were impelled by a purpose to accomplish the employer's business, to-wit, enroute to Hill & Hill to deliver the freight that he had been ordered to deliver by his employer and that he had been prevented from delivering due to the absence of Hill & Hill employees. They further laid down the rule that by the term, "zone of employment" was meant a place where the employee, in the performance of his duties, would constantly be.

The Supreme Court of Texas cites the case of *Dale v. Armstrong*, 190 P. 598, in the Huerta case, which decision was decided after the DeFrates case, relied upon by appellee, was decided and in which the Supreme Court of Texas discuss the holding in the DeFrates case. The Supreme Court rejects the contention made by the appellee in this cause by placing their firm stamp of approval upon the case of *Dale v. Armstrong*.

Upon oral argument before the Fifth Circuit the argument was made by Appellees counsel that White would not have been where he was and the accident would not have happened had it not been for the deviation. At this time Judge Hutcheson made the remark that it was a question of whether or not respondeat superior depended upon causation or representation; that there was no question but that at the time of the accident he was representing his employer. Causation does not enter into this matter as con-

tended by Mr. Fullingim under the decision in the Armstrong case in which the Court said as follows:

> "The defendant contends that he was not allowed to present his case fairly to the jury, because of the exclusion of material evidence. Morris was not permitted to testify that in delivering the box he would not have been at Central and Emporia avenues, where the accident occurred, if he had not gone on the errand for Handley, and that, if the accident had not occurred, he intended to go east on Central Avenue to St. Francis, south on St. Francis to Second, east on Second to Cleveland, north on Cleveland to Central, and then east on Central to Mathewson. The offered evidence was not material."

The Supreme Court of Kansas then used the words which were adopted by the Supreme Court of Texas as follows:

> "If the place where the accident occurred were a place where the driver, confining his conduct strictly to the business of delivering the box, might properly be, and if when at that place his movements were impelled by a purpose to deliver the box, the jury was authorized to say he was then within the scope of his employment."

The Court further says:

> "Intention and locality concurred to place him there. WHETHER OR NOT HE WOULD HAVE BEEN THERE BUT FOR THE DEVIATION, AND WHAT COURSE CONVENIENCE MIGHT HAVE SUGGESTED HE SHOULD TAKE FROM THERE

ON, WERE NOT IMPORTANT, There are authorities which would sustain a finding of fact that Morris was within the scope of his employment from the time he left Handley's house, but it is not necessary to approve or disapprove them. THE QUESTION OF WHEN THE COURSE OF DEVIATION HAS TURNED BACK INTO THE COURSE OF EMPLOYMENT IS A QUESTION OF FACT AND THE OBSERVATIONS JUST MADE ARE WELL WITHIN ANY REASONABLE RULE. Whatever may be said respecting the propriety of the court's rulings, the offered evidence was sufficiently covered by testimony which Morris was permitted to give. He described two so-called usual and ordinary routes of travel from the defendant's place of business to the place where the box was to be delivered, NEITHER ONE OF WHICH WOULD TOUCH THE PLACE OF THE ACCIDENT, and he then described what route he would take in making the delivery.

"After weighing the testimony, the jury was satisfied the route by way of Topeka Avenue to Central, and then east on Central to Mathewson, was just as 'usual and direct, regular and proper,' as any other, and so found."

In this case the appellee contends that had he gone to the company warehouse he would have then been within the scope of his employment, whereas, in taking the shorter and more direct route which White did take, he was actually much nearer to the completion of the company's business than he would have been had he gone back by the company warehouse. The mere fact that he went out of

the way to go back by the company warehouse on his way to his sister's house to lunch casts suspicion upon his story that he was supposed to leave the company truck during the lunch hour at the warehouse.

We think that under the recent case of *Loper v. Morrison*, 145 P. (2d) 1, that White was never at any time out of the scope of his employment. Secondly, we think that under the Huerta case he had definitely returned to the scope of his employment so as to render the master liable and thirdly, we respectfully submit that the circumstances of this case, the explanation of which, by the defendant, under the Texas authorities, was not sufficient to overcome the presumption and inferences of fact to be indulged in from the proof presented and in the alternative, we think that the case should be remanded so that the evidence as to how often he carried the truck home to lunch might be more fully developed.

CONCLUSION AND PRAYER

The above cases fully demonstrate that the Fifth Circuit has refused to follow the Texas decisions on a very important point of local law since it is involved in practically every automobile accident that occurs and we feel that this Honorable Court should review this case by grant-

ing a writ of certiorari and reversing the said decision for a new trial on the merits thereof.

Respectfully submitted,

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A copy of the petition for writ of certiorari and brief in support thereof has been furnished to John R. Fullingim of Amarillo, Texas, attorney for Respondents.

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JOHN J. WATTS